Supreme Court, U.S.
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No. 97-161

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MASAMI AIZAWA,
Petitioner,

v.

THE SOVEREIGN STATE OF JAPAN, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner filed an untimely notice of appeal from an order of the district court dismissing this case with prejudice on the basis of foreign sovereign immunity, and the Ninth Circuit dismissed his appeal for lack of jurisdiction.

The question presented is whether the district court's order granting dismissal was final and appealable, even though one party was inadvertently omitted from the list of parties as to which dismissal was granted, where it is clear from the record that the district court intended the dismissal order to be its final order in the case.

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BRIEF IN OPPOSITION

Respondents the Sovereign State of Japan, the Japanese Ministry of Justice, the Japanese Ministry of Foreign Affairs, the Supreme Prosecutor's Office of Japan, the Ishinomaki District Public Prosecutor's Office, and the Sendai High Public Prosecutor's Office respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

In what amounts to making to a last second "Hail Mary" pass, petitioner has seized upon a what was obviously an unintentional clerical error in an order entered by the district court in an effort to stave off the

consequences of his failure to file a timely notice of appeal from the court's final judgment. Both of the courts below have considered the issue that petitioner now brings to this Court and found it meritless. Because that assessment is correct, and because this case presents none of the factors that typically prompt this Court's exercise of its certiorari jurisdiction, review of the Ninth Circuit's decision in this case is clearly unwarranted.

Following the district court's dismissal of petitioner's suit against respondent the Sovereign State of Japan and several of its Ministries and Offices on the ground of foreign sovereign immunity, petitioner filed an untimely notice of appeal, and the Ninth Circuit dismissed the appeal for lack of jurisdiction. Petitioner now maintains that the district court never entered a final judgment—and hence that the time to appeal never began to run—because one of the district court's orders related to its dismissal of the case failed to list one of the respondents, the Japanese Ministry of Justice. As shown below, however, it was abundantly clear to all concerned that the district court intended to, and did, dismiss the case as to all parties.

Following the dismissal of his appeal by the Ninth Circuit, petitioner—citing for the first time the district court's omission of the Ministry of Justice in its order—returned to the district court and asked for the entry of final judgment. The district court rejected the request on the ground that final judgment had already been entered and the Ninth Circuit summarily affirmed that decision on appeal in an unpublished order. Petitioner now seeks review by this Court.

COUNTERSTATEMENT

Petitioner commenced this action in the United States District Court for the Northern District of California on April 13, 1994, naming as defendants respondent the Sovereign State of Japan, two Assistant United States Attorneys—Lawrence S. Middleton and Terrance A.

Bowers—and 100 fictitious parties, "Does 1-100." *See* Plaintiff's Unverified Complaint For Money Damages. On January 6, 1995, petitioner filed an amended complaint adding five Japanese Ministries and Offices and dropping Middleton and Bowers as defendants. *See* Plaintiff's First Amended Unverified Complaint. The five Ministries and Offices were respondents the Japanese Ministry of Justice, the Japanese Ministry of Foreign Affairs, the Supreme Prosecutor's Office of Japan, the Ishinomaki District Public Prosecutor's Office, and the Sendai High Public Prosecutor's Office. *Id.* ¶ 4.

In his complaint, petitioner—a Japanese national residing in California, *id.* ¶ 3—asserted several claims, all of which were said to have arisen from an alleged conspiracy between respondents and the United States Attorney's Office for the Central District of California to have petitioner extradited to Japan. *Id.* ¶¶ 9-10. Years ago petitioner was convicted of violating Japan's Public Office Election Laws, *id.* ¶¶ 11, 12, but he alleged that these were non-extraditable offenses. *Id.* ¶ 9.

On December 11, 1996, the nonfictitious respondents —*all* of the nonfictitious respondents, including the Ministry of Justice—moved to dismiss the case for lack of jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611.[1] *See* Defen-

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[1] Under the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States," 28 U.S.C. § 1604, unless one of the FSIA's enumerated exceptions applies, *see id.* § 1605. The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). Thus, "unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993).

In *Nelson* this Court held that a claim based on alleged torture and detention by the Saudi government did not establish jurisdiction under the FSIA, explaining that foreign sovereigns have immunity with respect to the exercise of powers peculiar to sovereigns as distinct from those powers that can also be exercised

dants' Notice of Motion and Motion to Dismiss Complaint Pursuant to F.R.C.P. 12(b). On June 24, 1996, following a hearing at which petitioner was represented by counsel, the district court granted respondents' motion, ruling that respondents were shielded by sovereign immunity, and dismissed the action.

From the transcript of the hearing it is clear that the court intended to dismiss the case as to all parties. During the hearing, counsel for petitioner recognized that the court was inclined to grant the motion to dismiss and that it would be necessary to litigate the issue of respondents' sovereign immunity on appeal. *See* Tr. of June 24, 1996 Hrg. at 10 ("I know Your Honor disagrees with our position. And so I—as I said, I think this just has to go to the Ninth Circuit and have them pass on all these issues"). At the end of the hearing, in a colloquy with counsel for petitioner, the court granted the motion to dismiss on the heels of counsel's declaration that he wanted to take the case to the Ninth Circuit (*id.* at 11):

> MR. ORD: Your Honor, I realize you've thought this out very carefully and I certainly respect your views and as I say, I think probably the best thing at this point is to—is for my client to take it up to the Court of Appeals if he wants to and try to get a definitive resolution on these doctrines.
>
> THE COURT: Well, Okay. I'm going to give you the definitive resolution at this judicial level then.
>
> MR. ORD: Yes sir.

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by private citizens. *See id.* at 359-362. As noted, the gravamen of petitioner's complaint is that the government of Japan conspired with American prosecutors to have him extradited. Clearly, private citizens have no power to request the extradition of other citizens from foreign countries. *Cf. id.* at 362 ("Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce").

> THE COURT: The motion to dismiss is granted without leave to amend. The action's dismissed and I just signed the order here. My clerk will send you copies of the minute order and the order.

In the minute order to which the court referred ("the June 24 order"), the district court included a memorandum opinion clearly stating that "[t]he motion to dismiss of *all named defendants* is granted without leave to amend on the ground of sovereign immunity and *the action is dismissed* by order signed and filed this date." App., *infra*, at 1a (emphasis added).[2]

The dispute remaining in this case turns on the other order that the district court filed on June 24 and entered on June 26, 1996 ("the June 26 order"). *See* Pet. App. 4. In that order, the court said that "[t]his action is dismissed with prejudice" and that "[t]his Order is a final judgment for purposes of Fed. R. Civ. P. 54(a)." *Id.* The court's docket entries likewise reflect that this was an order "terminating case." Docket Entry No. 48. In the June 26 order (and the docket entry), however, the Japanese Ministry of Justice was omitted in the list of defendants as to which dismissal had been granted. Also, the June 26 order was captioned "order dismissing action as to *certain* defendants." Pet. App. 4 (emphasis added).

On August 20, 1996, almost two months after the district court had dismissed the action, petitioner filed a notice of appeal—well after the time for filing such a notice had expired. *See* Fed. R. App. P. 4(a)(1) (notice of appeal in a civil case where the United States is not a party must be filed within 30 days of entry of judgment); *Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 264 (1978) (timely notice of appeal is mandatory and jurisdictional). In his notice, petitioner recited that

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[2] Respondents have reproduced the June 24 order in an appendix, even though petitioner did not, because it is a "relevant" opinion and order. S. Ct. R. 14.1(*i*)(ii).

he was appealing "the decision and order entered by the U.S. District Court for the Central District of California on June 26, 1996." Notice of Appeal at 1. Respondents moved to dismiss the appeal, explaining that petitioner had failed to notice his appeal within the 30-day time limit. Rather than respond directly, on October 15, 1996, petitioner, through counsel, moved for an extension of time in which to file a response. Petitioner's submission stated that his notice of appeal had been filed "within 60 days of the June 26, 1996, order." Appellant's Motion for Extension of Time to File Response to Motion to Dismiss ¶ 1. In that submission, petitioner said nothing about the omission of the Ministry of Justice from the June 26 order. On October 23, 1996, the Ninth Circuit dismissed the appeal for lack of jurisdiction. Pet. App. 5.

Searching for a way out of the predicament he had made for himself, on November 8, 1996, petitioner filed a motion in the district court styled a "Motion for Entry of a Final Judgment." Pet. 5. In that motion, petitioner for the first time pointed out that the Ministry of Justice had not been listed in the June 26 order and took the position that, because of this omission, the district court "had not yet entered a final judgment" in this case and therefore his appeal to the Ninth Circuit was "a legal nullity." Motion for Entry of a Final Judgment ¶ 3.

On November 22, 1996, the district court denied petitioner's motion as moot and rejected his view that this case was "still alive," explaining that "[f]inal judgment in this matter was entered on June 26, 1996, dismissing the action as to all defendants then left in the case." Pet. App. 2. With respect to the omission of the Ministry of Justice in the June 26 order, the district court stated that

> the Ministry of Justice is merely a part of "The Sovereign State of Japan" and was dismissed along with all of the other agencies of the Japanese government. This was made clear in the minute order of June 24, 1996, which made it clear that the action was dis-

missed as to Japan, and all of its agencies, by reason of sovereign immunity. [*Id.* at 2-3.]

On December 17, 1996, petitioner filed a notice of appeal from the district court's November 22, 1996 order. Pet. 6. On February 26, 1997, the Ninth Circuit issued an order requiring petitioner "to show cause why summary disposition is not appropriate," noting that "this court has previously dismissed the appeal from the district court's final order for lack of appellate jurisdiction." Order of Feb. 26, 1997, at 1. On April 24, 1997, the Ninth Circuit summarily affirmed the district court's decision and explained that "[a] review of the record and appellant's response to this court's order to show cause indicates that the questions raised in this appeal are so insubstantial as not to need further argument." Pet. App. 1. On June 4, 1997, the Ninth Circuit denied what it construed as a motion by petitioner for reconsideration and also rejected petitioner's suggestion for rehearing en banc. Pet. App. 6.

REASONS FOR DENYING THE WRIT

1. The petition ought be denied, if for no other reason, because petitioner does not allege any intercircuit conflict with respect to the legal issue on which his case turns. That is, while petitioner makes a ritualistic claim of conflict, *see* Reasons for Granting the Writ Nos. 1 & 2, he is unable to point to a single court of appeals decision holding on facts similar to this case that a district court's decision was not final and appealable. Indeed, he fails to cite a single court of appeals case arising in an analogous context.

Furthermore, wholly apart from the absence of conflict, this case simply raises no "important federal question" (S. Ct. R. 10(a)) requiring resolution by this Court. Although the legal standard for determining when a district court decision is final and appealable is, no doubt, an important question, that standard—as shown below—is quite settled, and this case involves

nothing more than a fact-bound application of that standard in a context where the answer is clear.

Petitioner obviously believes that the Ninth Circuit decided this case incorrectly—which it emphatically did not. But even if it had that would not be reason enough to grant review. *See* Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.17, at 193 (7th ed. 1993) ("It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions"). Justice Harlan's reminder that this Court does "not sit as a court of errors and appeals in state cases," *Burgett* v. *Texas*, 389 U.S. 109, 120 (1967) (Harlan, J., dissenting, joined by Black & White, JJ.), would seem to have equal force in a federal case such as this one.

2. Because the district court's June 26 order was a final and appealable judgment, petitioner's time for noticing his appeal expired long before he actually did so in August 1996. Under 28 U.S.C. § 1291, the courts of appeals have jurisdiction of appeals from the "final decisions" of federal district courts. "For a ruling to be final, it must end the litigation on the merits, and the judge must clearly declare his intention in this respect." *FirsTier Mortgage Co.* v. *Investors Mortgage Ins. Co.*, 498 U.S. 269, 273-274 (1991) (quotation marks, brackets, and footnote omitted). Thus, in *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978) (per curiam), this Court held that, although the district court had failed to set forth its final judgment on a separate document in accordance with Fed. R. Civ. P. 58, the appellate jurisdiction of the court of appeals nonetheless had been properly invoked under § 1291 because "the District Court clearly evidenced its intent that the opinion and order from which an appeal was taken would represent the final decision in the case." *Id.* at 387; *see also id.* at 385 n.6 (court of appeals must "determine whether the district court intended the judgment to represent the final decision in the case").

Following this Court's lead, it is well established in the courts of appeals that a judgment is final and appealable if from the record it is sufficiently clear that it was the district court's intent to render a final judgment. *See, e.g., National Distrib. Agency* v. *Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433 (9th Cir. 1997) ("A ruling is final for purposes of § 1291 if it (1) is a full adjudication of the issues, and (2) clearly evidences the judge's intention that it be the court's final act in the matter") (quotation marks omitted); *Spain* v. *Gallegos*, 26 F.3d 439, 446 n.9 (3d Cir. 1994) ("the district court clearly intended that its dismissal of the case would be its final decision"); *Fiataruolo* v. *United States*, 8 F.3d 930, 937 (2d Cir. 1993) ("What essentially is required is some clear and unequivocal manifestation by the trial court of its belief that the decision made, so far as it is concerned, is the end of the case"); *Chiari* v. *City of League City*, 920 F.2d 311, 314 (5th Cir. 1991) (judgment is final "if it is apparent that the district judge intended that the judgment dispose of all the claims before him"); *F. & H.R. Farman-Farmian Consulting Eng'rs Firm* v. *Harza Eng'g Co.*, 882 F.2d 281, 283 (7th Cir. 1989) ("the judge's intent to dismiss the entire suit is plain, which is enough to satisfy the final decision rule of 28 U.S.C. § 1291") (Posner, J.), *cert. denied*, 497 U.S. 1038 (1990). The "focus [is] on the court's intent," which is inferred "from the record as a whole." *National Distrib. Agency*, 117 F.3d at 434.

Here, a review of the pertinent parts of the record leaves not a shred of doubt that the district court intended to bring this litigation to a close on June 24, 1996.

At June 24, 1996 hearing, counsel for petitioner twice expressed a desire to have the Ninth Circuit rule on the issue of respondents' sovereign immunity, *see* Tr. of June 24, 1996 Hrg. at 10, 11, so that he could "get a definitive resolution." *Id.* at 11. Acceding to counsel's wishes, the district court agreed "to give [him] the

definitive resolution at this judicial level" (*id.*) and then promptly dismissed the case with prejudice. *See id.* ("The motion to dismiss is granted without leave to amend. The action's dismissed and I just signed the order").

In the June 24 order, the court—with the unmistakable intention of terminating the litigation—stated that "[t]he motion to dismiss of *all named defendants* is granted without leave to amend on the ground of sovereign immunity and *the action is dismissed*." App., *infra*, at 1a (emphasis added). From this, it is clear that the court intended to dismiss as to the Ministry of Justice along with each of the other respondents.

That this was the district court's intent it is made not just clear, but crystal clear, from the fact that, in granting respondents' motion to dismiss, the court expressly declined to give petitioner leave to amend his complaint. App. 1a. In *Gerritsen* v. *De La Madrid Hurtado*, 819 F.2d 1511 (9th Cir. 1987), plaintiff sued "the President of Mexico, the Mexican Consulate, and several consular officials and employees associated with the Mexican Consulate in Los Angeles." *Id.* at 1513. The district court sua sponte dismissed the complaint in an order concluding with the statement that "President de la Madrid is dismissed from this action with prejudice; plaintiff's complaint is dismissed for lack of subject matter jurisdiction." *Id.* at 1514. On appeal, the Ninth Circuit held that the order was appealable (even though it purported to dismiss the complaint rather than the action), explaining that "[t]he order did not grant Gerritsen leave to amend the complaint. Failure to allow leave to amend supports an inference that the district court intended to make the order final." *Id.*

In short, it is impossible to read the June 24 order and not understand that petitioner had just lost the case and every respondent had won. Petitioner, in fact, concedes that the June 24 order indicates that the motion to dismiss was granted as to all of the respondents. Pet. 4.

In the face of this clarity of intent, petitioner relies on the June 26 order. That document, however, cannot carry the day for him. In the June 26 order, the district court expressly stated that "[t]his Order is a *final judgment* for purposes of Fed. R. Civ. P. 54(a)." Pet. App. 4 (emphasis added). And as significant as the emphasized language is the court's tell-tale invocation of Rule 54(a). That rule applies to "any order from which an appeal lies." Pet. App. 7. Thus, the court's reference to Rule 54(a) is a sure sign that it understood its order to be an appealable—meaning final—order. Finally, the docket entry concerning the June 26 order reflects the court was "terminating [the] case" with that order.

In light of the clear evidence of the district court's intent, the court's inadvertent omission of the Ministry of Justice from the June 26 order does not mean that the order was not final. The court's clear intent trumps any ambiguity created by this clerical oversight. *See Witherspoon* v. *White*, 111 F.3d 399, 401-402 (5th Cir. 1997) ("In circumstances in which a court order is ambiguous as to what parties and claims are being disposed of and the district court intended to effect a final dismissal of a claim, we will construe its order accordingly, despite ambiguous language that might indicate otherwise") (quotation marks, ellipses, and brackets omitted). The fact that the order was styled as one dismissing the action as to "certain" defendants (Pet. App. 4), can be explained by the fact that two of the original defendants—Middleton and Bowers—had already been dropped from the case.

Petitioner's own conduct, moreover, demonstrates that he understood the district court's June 26 order as a final order. In the nearly two months between June 26 and August 20, 1996, petitioner filed nothing and moved for nothing in the district court. Then, on August 20, he filed a notice of appeal—hardly the action of a litigant who believes the time for appeal has not yet commenced to run. It was not until after his appeal had been dis-

missed that petitioner was struck with the remarkable epiphany that his notice of appeal had been filed, not too late, as the Ninth Circuit thought, but too soon.

Petitioner argues (Pet. 13-16) that the June 26 order was not final and appealable because it did not satisfy the certification requirements of Rule 54(b), the rule governing a court's entry of "a final judgment as to one or more but fewer than all of the claims or parties." Pet. App. 7. The problem with this argument is that it rests on the incorrect premise that the district court intended to grant final judgment to fewer than all of the parties. As shown above, the district court's obvious intention was to enter final judgment as to all parties. In particular, the court's citation in the June 26 order of Rule 54(a)—the rule applicable to final, appealable judgments—makes clear that the court was not proceeding under Rule 54(b).

It should also be noted that petitioner does not even attempt to offer a theory why the district court might have intended to dismiss the case as to every defendant except for the Ministry of Justice. The motion to dismiss for reasons of sovereign immunity was brought by all respondents, including the Ministry of Justice. Neither respondents in their motion nor petitioner in his reply made any argument that the motion should be granted (or denied) as to fewer than all respondents. And the reasons the district court gave in the June 24 order for granting the motion provide no basis for thinking that it was granted as to some, but not all, respondents. In other words, there is not a single reason to believe that the omission of the Ministry of Justice from the June 26 order was anything but inadvertent.

Furthermore, this is not a case in which one must guess the intent of the district court. Here, we know that the court intended the June 26 order to be final because we have its actual views on the subject. Following the Ninth Circuit's dismissal of his first appeal, petitioner returned to the district court and moved for entry of a

final judgment. The district court, however, explained that "[f]inal judgment in this matter was entered on June 26, 1996, dismissing the action as to all defendants then left in the case." Pet. App. 2. Thus, there can be no question about the court's intent since the court has explained what it was.

Petitioner asserts that, because of his lack of facility with English, he was "confused" by the June 26 order. Pet. 5. An untimely notice of appeal cannot be excused, however, even in the case of a pro se litigant. The equities, moreover, are hardly on petitioner's side. Petitioner states that he was represented by counsel at the time the district court dismissed the case. Pet. App. 17. Upon learning that his case had been dismissed, he could have easily at that time asked counsel when his notice of appeal was due.

There were also certain procedural steps petitioner could have taken to dispel, and protect himself from, any confusion from which he may have suffered. First, if petitioner was not sure whether the time to appeal had started to run, he could have filed a protective notice of appeal, any dismissal of which would have been without prejudice to him. Second, if petitioner did not know whether the omission of the Ministry of Justice from the June 26 order was a mere scrivener's error, he could have sought an answer by moving under Rule 60. *See* Fed. R. Civ. P. 60(a) ("Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party"); *see also Hasbrouck* v. *Texaco, Inc.*, 879 F.2d 632, 636 (9th Cir. 1989) ("A court's failure to memorialize part of its decision is a clerical error"). Petitioner did neither of these things.

3. In denying petitioner's motion for entry of judgment, the district court explained that the Ministry of Justice had not been left out of its June 26 order because "the Ministry of Justice is merely a part of 'The Sover-

eign State of Japan' and was dismissed along with all of the other agencies of the Japanese government." Pet. App. 2-3. Petitioner argues that this explanation conflicts with this Court's admonition that for purposes of the FSIA "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *First Nat'l City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983); *see* Pet. 10. He did not, however, raise this argument in the court below,[3] and therefore it should not be considered for the first time by this Court. *See, e.g., Ryder* v. *United States*, 515 U.S. 177, 186 (1995). In any event, the Ministry of Justice is not a "juridical entit[y] distinct and independent" from the Sovereign State of Japan itself.

The FSIA draws a distinction for certain purposes between, on the one hand, a "foreign state," a term that "includes a political subdivision of a foreign state," and, on the other hand, an "agency or instrumentality of a foreign state." 28 U.S.C. § 1603.[4] All of the cases on which petitioner relies[5] involved government-owned corporations, which are treated as agencies or instrumen-

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[3] *See* Appellant's Response to Order to Show Cause Why Summary Disposition is Not Appropriate; Appellant's Supplemental Response to Order to Show Cause Why Summary Disposition is Not Appropriate; Appellant's Reply to Appellee's Filing Pursuant to the Court's Feb. 26 Order. Appellant did raise the argument in the "Opening Brief" he sent to the Ninth Circuit but the Ninth Circuit, as explained in Point 4 below, properly did not consider that brief.

[4] Thus, the FSIA prescribes a different mode of service upon foreign states and political subdivisions thereof than upon agencies and instrumentalities of foreign states. *See* 28 U.S.C. § 1608.

[5] *See* Pet. 9, 12 (citing *First City National Bank, supra*; *McKesson Corp.* v. *Islamic Republic of Iran*, 52 F.3d 346 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996); *Hester Int'l Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170 (5th Cir. 1989); *Hercaire Int'l, Inc.* v. *Argentina*, 821 F.2d 559 (11th Cir. 1987); *Gibbons* v. *Republic of Ireland*, 532 F. Supp. 668 (D.D.C. 1982)).

talities under the FSIA. *See id.* § 1603(b). The Japanese Ministry of Justice, however, is not an agency or instrumentality within the meaning of the FSIA but rather a political subdivision of a foreign state. *See Unidyne Corp.* v. *Aerolineas Argentinas*, 590 F. Supp. 398, 400 (E.D. Va. 1984) ("A political subdivision of a foreign state includes all governmental units beneath the central government"). Thus, in *Unidyne* the court held that the Argentine Naval Commission ("ANC")—a department of the Argentine Navy—was a political subdivision of Argentina for purposes of the FSIA.[6] In so doing, the court observed that "[t]he ANC is part and parcel of the Argentine Navy * * * The ANC has no life other than that derived from Argentina; rather the agency is Argentina * * *, not an entity independent of it." *Id.*

So too here, the Japanese Ministry of Justice is properly viewed as "part and parcel" of the Sovereign State of Japan. Accordingly, the district court's dismissal of the case with respect to the Japanese government is correctly understood as a dismissal with respect to the Ministry of Justice. *Cf. Martinez* v. *Winner*, 771 F.2d 424, 442 (10th Cir. 1985) ("the Department of Justice was properly dismissed as a named defendant, if for no other reason, because it is not a juridical entity separate from the United States"), *vacated & remanded to consider question of mootness sub nom. Tyus* v. *Martinez*, 475 U.S. 1138 (1986), *judgment vacated as moot*, 800 F.2d 230 (10th Cir. 1986).[7]

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[6] *See also Gerritsen*, 819 F.2d at 1517 (Mexican Consulate is a foreign state); *Tucker* v. *Whitaker Travel, Inc.*, 620 F. Supp. 578, 581 (E.D. Pa. 1985) (Bahamian Ministry of Tourism is a foreign state), *aff'd*, 800 F.2d 1140 (3d Cir.) (table), *cert. denied*, 479 U.S. 986 (1986). *But see Behring Int'l, Inc.* v. *Imperial Iranian Air Force*, 475 F. Supp. 396, 403 (D.N.J. 1979) (concluding, without discussion or analysis, that Iranian Air Force is an agency or instrumentality).

[7] Although the Tenth Circuit on remand from the Supreme Court vacated its judgment in the case on mootness grounds, the court denied a request to vacate its published opinion, saying that

4. Finally, petitioner asks this Court to exercise its supervisory power over the court below for its failure to consider his opening brief. Pet. 17. The Ninth Circuit did nothing to warrant the exercise of that power.

On February 26, 1997, following receipt of petitioner's notice of appeal from the district court's November 8, 1996 order, the Ninth Circuit—after reviewing the record and determining that it had previously dismissed petitioner's appeal from the district court's June 26 order—directed petitioner to show cause why summary disposition was not appropriate. In March 1997, petitioner filed a response to the show cause order, a supplemental response, and a reply to respondents' submission with respect to the order. After considering these submissions, the Ninth Circuit summarily affirmed on April 24, 1997. Pet. App. 1. Because the Ninth Circuit determined that petitioner had failed to make the showing necessary to avoid summary disposition, the court had no need, and was under no obligation, to consider petitioner's opening brief, which was filed on April 18, 1997. Petitioner had ample opportunity to explain why summary disposition was inappropriate and simply was unable to do so in three filings.

Petitioner also complains that the Ninth Circuit construed his petition for rehearing as a motion for reconsideration under Ninth Circuit Rule 27-10 in—he alleges—an "apparent" effort to circumvent the en banc review process. Pet. 17. Rule 27-10 applies to motions for "clarification, reconsideration, or rehearing of an order entered by a motions panel." Pet. App. 10. The Ninth Circuit's summary affirmance order of April 24, 1997, appears to have been issued by a motions panel.[8]

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the opinion "may be useful to someone in the future." 800 F.2d at 231.

[8] The show cause order issued by the Ninth Circuit on February 26, 1997, was signed by "Song Hill, Motions Attorney/Deputy Clerk."

There is no reason to believe that the Ninth Circuit failed to follow correct procedure in this instance. Nor is there any reason to believe that petitioner's suggestion for rehearing en banc failed to receive the consideration it was due. *See* Pet. App. 6 ("reject[ing]" the suggestion). Review of the Ninth Circuit's internal operating procedures surely is not warranted in this case.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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